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In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE JAPANESE STEAMSHIP "BOSTON MARU"

Appeal from the United States District Court, for the District of Oregon

Appellant's Reply Brief

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ARMBRUSTER & RENFRO, INC.

TOPICAL INDEX

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APPEAL NOT A SHADOW

The bare facts of these cases are not greatly in dispute. Conflicts relate principally to the minor issues and to small differences of expert opinion among the pilots. The issues contested between respective counsel largely have to do with conclusions drawn from the testimony. The Appellate Court is not concerned to a great extent with the credibility of witnesses and their demeanor on the stand. The problem of this Court is to take up the various threads of testimony and draw therefrom just conclusions of law. Therefor the cases cited on pages 20-22 of Appellee's brief are not particularly applicable.

The Ariadne, 13 Wall. 475, 479:

> We are not unmindful that both the Circuit and District Court came to a conclusion different from ours as to the alleged fault of the steamer.
>
> Their judgments are entitled to, and have received, our most respectful consideration. Their concurrence raises a presumption, prima facie, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought, and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect.

The Columbian, 100 Fed. 991, 996:

> . . . On the other hand, it sometimes happens that the judge of the first instance receives misleading impressions with reference to the weight to be given the testimony; and it also sometimes happens that a court which has a printed record, and thus can easily balance one portion of the proofs against another, derives advantages superior to any which the instance judge can derive from a personal inspection of the witnesses.

JUDGE BEAN'S OPINION

Appellee has departed from the apostles by including in its brief a copy of the opinion of the trial court. We are perhaps justified in going

beyond them to say that this opinion could not appear in the apostles because the Court did not cause it to be filed and it forms no part of the record in the District Court.

STAGE OF WATER

Appellee twice quotes Captain Gildez (Appellee's Brief 5, 26) to the effect that at the time of the collision the water was "about one foot" above low water. He was of course attempting to state the results of Government observations. Hickson stated them first hand and said the stage of water was one and one half feet above zero (A 89) (Our brief 48).

KNOWLEDGE REQUIRED OF GILDEZ

On pages 26-27 of its brief Appellee, we think, understates the degree of skill and knowledge required of Captain Gildez in selecting his anchorage and overstates the amount of reliance which the law permits him to place upon an antiquated chart.

The alleged shoal had undoubtedly disappeared for all practical purposes more than two years before the collision (Our brief 48-49). Counsel says in effect (Appellee's brief 27) that common sense says the shoal would never wash away. We believe it is common knowledge that the current of a river tends to smooth out the humps and bumps on its bottom, and that we could support this statement by reference to learned works on

physical geography. This is unnecessary, however, for Mr. Hickson, who has had eighteen years' experience noting the action of the current of the Columbia River on its shoals and bars, not only said the shoal would wash away but stated the time required in the process, namely, "a year or so" (A 71). The court will judicially recall the jetties at the mouth of the Columbia and will also be informed by the chart in evidence and by its own judicial knowledge that an important method of dredging the Columbia River channel is the construction of jetties at such points that they will cause the current to do the work.

Atlee vs. Packet Co., 21 Wall. 389, 396.

Davidson Steamship Co. vs. United States, 205 U. S. 187, 193.

The Supreme Court in these cases has outlined something of the extent of knowledge and skill required of a pilot. He must know channels, currents, obstructions, bars, landmarks and other physical conditions. To gain this information he has access to charts and other Government data, but the main source is practice, observation and experience. In the last named case a pilot damaged a Government breakwater through reliance upon an old chart and in disregard of facts which he could have learned by observation and through later Government circulars. The shipowner was held liable.

UNIFORMITY OF CUSTOM

Appellee claims we have not shown uniformity as to the customary anchorage and relies on two classes of evidence: First, that the anchorage in question was in accordance with the practice of pilots Moran, Allyn, and Sullivan (Appellee's brief 33); and secondly, that only at Oak Point or Longview do pilots turn out to anchor away from the customary track of navigating vessels (Appellee's brief 25).

Captain Moran, a witness for respondent (A 257), said on cross examination that a pilot sometimes will drop anchor anywhere if he only intends to stay for a few hours. He did not say whether he referred to day or night and did not testify that it was customary to anchor where the Boston Maru was placed or out of the regular anchorage and go to sleep leaving a vessel there all night with a flood tide in prospect. Moran stated definitely that he ordinarily anchored five or six hundred feet farther out than where the Boston Maru was anchored (A 256) and abreast of Columbia City Front.

Captain Allyn, a witness for respondent, said on direct (A 259) that the Boston Maru was "over near the place where he would anchor." He was not asked on direct where he would anchor. At the opening of his cross examination he stated definitely that he would anchor opposite Columbia City Front on the Lamonts-Caples Point line. This would place him some four hundred feet

below and about eight hundred fifty feet easterly from the amidships of the Boston Maru at the time of the collision.

The statement of Captain Sullivan, witness for Appellee, that vessels are customarily anchored "in the vicinity" of the Boston Maru (A 197) is too vague to break down more specific testimony on custom. The captain knew of the wide use by other pilots of the Red Range (A 221), although he had not anchored at Columbia City since prior to establishment of the Red Light at 27-2 in April, 1923 (A 223).

We submit that the incidental remarks of these three witnesses do not refute the testimony on uniformity.

The testimony as to Oak Point or Quinns and Longview is merely to the effect that at these places a ship can anchor farther away from the main channel than at others. This does not tend to show that it is not customary to anchor as far as possible from the main channel at Columbia City.

Captain Dalby (Baldy) said, referring to the Lamonts-Courthouse line opposite or a little below Columbia City Front (A 151):

> . . . Some places along that river we have places to anchor, and generally swing to one side there and anchor. This is one of the places as long as the atmosphere is clear, as a rule, we go out to the anchorage grounds.

NO REGULATION FOR WARNING

Appellee contends that because no statute requires an anchored vessel to blow whistles the Boston Maru is to be excused for not having done so. We remind the court that the Boston Maru was in an unusual, dangerous and deceptive location. The cases require precaution commensurate with the dangers she created (Appellant's brief 67).

Article 29 of the Inland Rules, being section 7903 Compiled Statutes, provides as follows:

> Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, *or by the special circumstances of the case.*

DISTANCE OF BOSTON MARU FROM SHORE—SUCTION—DIRECTION OF WEST KEATS

Appellee states and assumes on page 24 of its brief that the Boston Maru would swing on the radius not appreciably greater than 400 feet and that her stern would therefor be 250 feet from the deep water line along the Oregon shore. With this assumption, our dividers describe the distance as 175 feet if the bearing of the bow was incorrect and 125 feet if it was correct (Our brief 14-15).

But we contend that the record does not contain any definite answer to the question how far a vessel will stretch out her anchor chain when swinging on a changing current, and that in the nature of things there can be no definite answer (Berry 120). Captain Allyn, a witness for the Boston Maru, said on direct (A 261):

> Q. When it does swing, the radius of the arc on which it swings is what?
>
> A. That would be a hard thing to say, because you never know what the wind or tide conditions are.
>
> . . . . . .
>
> Q. Now, would the radius of the arc on which the vessel swings be much in excess of the length of the vessel?
>
> A. That I couldn't say; I don't know.

Peculiarities of currents at different times, places and conditions are such that it would indeed be hard to phrase a law governing all circumstances. The record indicates that no vessel ever before swung on her anchor chain in the same place that the Boston Maru swung on the night of the collision. To determine how the chain led calls for consideration of other evidence.

Counsel says (Appellant's brief page 58) that we contend that the bow of the West Keats sheared to starboard. We could not properly make such a contention as there is no evidence whatever to support it. What we desired to say

on page 89 of our main brief is that the suction counteracted the starboard helm and the West Keats went straight and neither answered to her starboard helm nor sheered in response to the suction. This is in accordance with the undisputed testimony of Berry and Gillette (A 109, A 422).

The latter said in reference to the hard-a-starboard order (A 422):

Q. Did the ship obey her helm?
A. No, sir.

Q. Which way did it go?
A. Kept right going straight ahead.

Appellee contends that the West Keats was going toward the Oregon shore at the time of the collision and that there was no suction. If so, why did not the hard-a-starboard helm take hold and why did not the Keats run ashore? It is impossible to conclude there was no suction unless Berry and Gillette are incapable of belief.

The only conclusion is that the stern of the Boston Maru was fairly close to the six fathom line although more than 300 feet from the Oregon shore.

WARRIOR ROCK AND ST. HELENS JETTY LIGHT, 28-2

Appellee showed that there was nothing in particular to obstruct the line of vision from

Warrior Rock to the place of collision and inferred that Berry should have been on his guard as to the situation when he passed Warrior Rock. This sounds reasonable at first blush but the pilots placed on the stand by respondent did not bear out the idea. Captain Moran did not make out the lights of the Boston Maru until after he left the end of the St. Helens Jetty (A 248). Captain Allyn, Appellee's witness, pointed out on *direct examination* (A 262) that a pilot would be too busy looking at his course after passing Warrior Rock and that he would not have an unobstructed view of the lower river until after he passed the St. Helens jetty light at 28.2. No pilot even suggested that Berry should have made the lights of the Boston before he did. The law requires these lights to be visible for only one mile (Inland Rules, Art. 11).

Berry made the lights of the Boston when about at 28.2 (A 101). Page 61 of Appellee's brief contains a statement that Berry admits he was then uncertain what the lights meant. We see no such admission in his testimony. He said clearly (A 103) that he then thought she was in the regular anchorage.

No pilot gave testimony tending to throw doubt on the reasonableness of Berry's then belief that the Boston was in the usual anchorage. The real question under the expert testimony was whether Berry could reasonably be expected to

know the unusual location of the Boston fairly accurately, not at a mile or more, but at 2000 feet.

Looking at the stretch of water from 28.2 to the end of the St. Helens bar range the Court will note that the Boston Maru was not straight ahead but partly around a curve and that the angle subtended by a line from that vessel to the regular anchorage is very small.

"BERRY SHOULD HAVE SLOWED DOWN"

In giving special emphasis to this theory, Appellee assumes knowledge by Berry (or liability to be charged with knowledge) either of the location of the Boston Maru or else that he did not know her location. It is undisputed in the record that he did not know her location until he was comparatively close to her, that he did not realize she was out of the anchorage until after he had turned off the St. Helens bar range (Our brief p. 88) and was headed toward her, and that the knowledge that she was close to the shore *was borne upon him gradually rather than abruptly.* The issue is not what he knew but what he should have known and the reasonableness of his judgment.

In considering the effect of slowing down the Court will remember that there is an abundance of uncontradicted testimony in the record that:

(1) The West Keats steers best at full speed ahead.

(2) With her engines stopped she does not steer well.

(3) When her engines are stopped at full speed she would travel three or four miles on her own momentum if she could be kept going straight.

(4) When she is going ahead and her engines are set astern her bow swings to starboard. The amount and angle of her swing or sheer depends on speed and other factors and its uncertain and variable.

It is pertinent to ask *where, when, why and how* he should have slowed up. If Berry had known or suspected the location of the Boston at a mile distant or even at a half a mile it would have been easier and safer for him to have left the ranges and proceeded on the Washington side. Slowing up would have meant merely loss of rudder power and there was no possible reason for it. Other pilots do not slow up for a ship at anchor at this point (McNelly 279).

Inside half a mile the idea of slowing up involves doubts and dangers. By proceeding half ahead or stopping his engines he would lose less or more steerage power without losing a great deal of way. The testimony of Captain Sandstrom is very clear on this point, and is uncontradicted (A 166-7):

> COURT: Now suppose a careful navigator coming up the river or down the river, I

think it was, should notice in the channel, athwart the channel, a vessel at anchor two thousand feet away from him, what would be the proper course, reasonable and proper course, for the navigator to pursue?

A. When he was down that far the most reasonable course that he would proceed on the Oregon side, to go by on that side.

COURT: As long as he saw clearance, he wouldn't be expected to slow down, stop the speed of his boat?

A. No, that would probably be a worse thing to do.

COURT: Why?

A. Because he would lose control of his ship immediately he stopped the propeller. This class of vessels the minute you stop the propeller won't steer two lengths themselves.

COURT: How far would it go on its own momentum?

A. If she would run perfectly straight she would probably go three or four miles on her own momentum.

Again, inside a half a mile, Berry might have set the engines full or half astern. If he had done this when close to the Boston, say less than a thousand feet, the testimony shows with considerable certainty that he would have hit her head on. At greater distances the results of an astern maneuver are altogether speculative. He might have hit the Boston head on or broadside

or with his stern, or he might have passed her bow safely and fouled her anchor chain, or he might have passed bow and anchor chain and gone ashore on the Washington side, or he might have passed safely and succeeded in turning back into the river.

This much is certain from the expert testimony, that no pilot will set a vessel like the Keats from full ahead to astern suddenly except in an emergency and with plenty of river to turn in. No such emergency ever existed in this case before the collision either in Berry's mind or in fact.

We confidently assert that all speculation as to when, where, how and why Berry might have avoided the collision by slowing up results in zero. The idea of slowing up, first applied to a lay mind, finds ready and eager acceptance, but it does not bear analysis when exhibited in the light of the pilots' testimony.

When counsel argues that Berry should have slowed up he first assumes that Berry knew the Boston Maru was out of the anchorage before he did or became doubtful of her position before he did. Berry testified that he thought she was in the anchorage when he first made her lights about at 28.2 (A 103) and when he made the turn off the St. Helens bar range about half a mile from her (A 108), and that he gradually, not suddenly, became aware that she was out of place (A 108). His course confirms the truth of his testimony.

It might be argued that he should have known her position before he did, but counsel does not emphasize this point and the testimony is the other way. Sandstrom (164) said he could reasonably locate her at 2150 feet or less depending on the darkness. Grunstad said the same as to 2000 feet (A 179-80). Sullivan, Appellee's chief expert witness, said he might get within 1000 feet and still be easily mistaken as to her position (A 209). At 1000 feet Berry had become fully aware of the situation and was probably getting ready to stop his engines (Our brief 90). Dalby, who saw the Boston Maru just after the collision, and knew more about the facts than the other experts says (A 151):

> Q. Suppose you had been on the "West Keats" in his place; at what point do you think you could have determined where the "Boston Maru" was anchored.
>
> A. Well, I wouldn't probably have turned out (determined it?) much quicker than he did, because naturally we would think the vessel was anchored over where she was anchored in clear weather. I never seen a ship anchored there in my life in clear weather.

Again, when counsel argues that Berry should have slowed up, he devotes considerable space to *dicta* of the courts but practically none to the testimony. We think the latter should have precedence. The problem is specialized and localized. Also, the exact method of handling a ship, as distinguished from general rules of naviga-

tion, is a subject of technical knowledge rather than law.

NARROW CHANNEL RULE A PASSING RULE

On pages 95 to 101 of our main brief we contend that Article 25 of the Inland Rules does not apply to the case, broadly for three reasons:

(1) The narrow channel rule is flexible and should not receive a construction that condemns the use of Government-established ranges;

(2) The rule recognizes anchorages and navigating channels existing side by side, and the navigator is not required to leave the customary navigating channel and invade the customary anchorage when the latter lies to the right of the former; and

(3) The narrow channel rule is a passing rule and does not apply in respect to ships at anchor, especially when anchored in violation of the anchorage statute.

Counsel take issue with us on only the third contention and claim that the narrow channel rule applies to anchored as well as navigating vessels, citing the following cases on page 55 of their brief:

The Kathleen Tracy, 296 Fed. 711.
Bisso Towboat Co. v. U. S., 6 F. (2d) 132.
Occidental Company v. Smith, 74 Fed. 261.

The two cases last named involve passing vessels and not anchorage.

In *The Kathleen Tracy* the steamer Lake Ledan dragged off the general anchorage in a gale. Her officers met the situation and the Court commends their action. Arrived at a safe place between two channels they veered more chain and dropped another anchor which held her. The Court says:

> I can think of no better place to lay up the steamer under the circumstances so far as navigation is concerned.
>
> . . . . .
>
> This is a fixed and pivotal fact in the case.
>
> . . . . .
>
> I do not think that the Lake Ledan was an obstruction to navigation.

The tug Tracy passed to her left of another tug with carfloats, and her tows fouled the Lake Ledan's anchor chain. The Court holds the Tracy at fault in three particulars:

1. Her lookout did not see the lights of the carfloat tug until too late to cross and pass to the right of her (as required by Article 18 of the Inland Rules);

2. Her master admits he did not see the Lake Ledan's anchor lights as early as he should have; and

3. The Tracy did not keep on the right hand side of the channel.

It will be seen that the narrow channel rule was here invoked as between the Tracy and the carfloat tug. If the Tracy had seen the lights of the Lake Ledan and the carfloat tug soon enough to pass the latter port to port as required by Article 18, and had thus followed the narrow channel rule, she would not have fouled the Lake Ledan. We believe that as far as the narrow channel rule is concerned *The Kathleen Tracy* is a passing and not an anchorage case.

The only cases we know of referring to the narrow channel rule strictly in connection with anchored vessels hold that the rule does not apply in anchorage cases, especially where the anchored vessel is improperly placed. These cases are cited on pages 100-101 of our main brief and are:

> *The John H. Starin,* 122 Fed. 236, 239, and
> *The Belfast,* 226 Fed. 362, 366.

CONTENTIONS RESPECTING WEST KEATS

We contend, first, that no fault of commission or omission on Berry's part is shown by a preponderance of the evidence, and second, that a preponderance of the evidence upholds his conduct.

There was no evidence that he should reasonably have made out the lights of the Boston Maru before he did. At that time he believed the Boston was in the usual anchorage. Much evidence tends to show that this belief was reasonable, and there was none to the contrary. There

is no testimony whatever tending to prove that he should reasonably have known the Boston was out of place until after he turned off the St. Helens bar range and he did not know it then. It is natural under the circumstances that the information that she was off the anchorage and fairly close to the Oregon bank should have come to him gradually and not in the form of a sudden shock.

The consensus of opinion of the pilots is that he should reasonably have been able to determine her position pretty accurately at about 2000 feet or closer, depending on the degree of darkness.

The composite judgment of the pilots was that a turn at 2000 feet to the Washington side would have been sharp, unusual and dangerous.

Any slowing or stoppage of his engines would have resulted in a loss of steering power. No witness gave testimony tending to prove that a half speed, slow ahead, stop or astern bell would have been helpful or even safe at any time. There was much testimony directly to the contrary, especially that showing the effect of slowing, stopping and backing the engines. After turning off the range any slowing would have been useless and even dangerous as the record shows without contradiction. Berry held at full speed getting all the purchase possible on the hard-a-starboard helm until he saw that the rudder would not take hold. Then he stopped the

engines and held his helm hard-a-starboard until after the collision.

This stoppage is not criticised or charged as negligence.

Berry might have avoided the collision by an unusually shrewd and lucky guess at the location of the Boston Maru, or by a spectacular and dangerous turn of doubtful necessity, if the same resulted successfully, but the law does not demand either of these.

The things which Captain Berry actually did are well known and are not particularly criticised. Criticism consists of pointing out things which he did not do but might have done. With a chart before one showing the event in plain lines it is easy to say that if Berry had done thus or so he could have avoided the collision. But the question is whether he acted with reasonable prudence.

The Nevada, 106 U. S. 154, 157.

The canal boat Kate Green came into a slip just as the Nevada was about to leave and made fast to the Hart, another canal boat. Suction of the Nevada's propeller broke the Hart's fastenings to the slip and the Kate Green was damaged. The Nevada was at fault for not keeping a lookout aft. Referring to those on board the Kate Green, Mr. Justice Bradley said:

. . . It was reasonable for them to suppose that the fastening of the "C. H. Hart" was secure. They could not know that it would break. It was that break which set them adrift, subject to the suction caused by the motion of the "Nevada's" propeller. Their own fastenings were sufficient. We do not see how the court could find otherwise than that they were free from fault or negligence. Perhaps they might have done something else which would have been better. *The event is always a great teacher.* They might have stayed out in the river and not entered the slip; or, having entered, they might have gone back to the bulkhead, and stayed there till the "Nevada" left. But these possibilities are not the criteria by which they are to be judged. *The question is, Did they do all that reasonable prudence required them to do under the circumstances?* And this question, we think, must be answered in the affirmative.

Carscallon vs. Coeur D'Alene Co. (Ida.), 98 Pac. 622.

Pittsburgh & Erie Coal Co. vs. George Urban Milling Co., 226 Fed. 332, 334.

The R. P. Fitzgerald, 212 Fed. 678, 684.

POINTS AND AUTHORITIES

Anchorage obstructing or preventing passage of other craft is unlawful.

Act of March 3, 1899 Compiled Statutes P. 9920.

The Europe (CCA 9th), 190 F. 475.

The Caldy, 153 F. 837.

The Hilton, 213 F. 997.
The Itasca, 117 F. 885.
The Bern, 255 F. 235.

Anchorage contrary to regulation or custom is unlawful.

Culbertson v. Shaw, 18 How. 584.
U. S. v. St. Louis Co., 184 U. S. 247.
The Sandford-Strathleven, 203 F. 331; 213 F. 975.
Graves v. Lake Michigan Ferry Co., 183 F. 378.
The Admiral Cecille, 134 F. 673.

Anchorage on or near a range is wrongful.

City of Birmingham, 183 F. 559.
The Milligan, 12 F. 338.
The Belfast, 226 F. 362.

Precautions of anchored vessel should be proportionate to the perils assumed.

The Ogemaw, 32 F. 919.
The Starin, 122 F. 236.
Article 29, Inland Rules; Compiled Statutes P. 7903.

Where a vessel improperly anchored is run into the burden of proof is upon her to show the moving vessel at fault.

The Clara, 102 U. S. 200, 202.
The Starin, 122 F. 236.

The Prudence, 212 F. 537.
The Miner, 260 F. 901.
The Europe, 175 F. 596, 190 F. 475.
The Belfast, 226 F. 366.
Graves v. Lake Michigan Co., 183 F. 378.
The Sandford-Strathleven, 203 F. 331.
The Nereus, 23 F. 448.
The Oregon, 158 U. S. 186.

The narrow channel rule is flexible and does not forbid use of ranges.

The Klatawaw, 266 F. 120.
The G. S. Tice, 287 F. 127.
The Three Brothers, 170 F. 48.
Transfer No. 21, 248 F. 459.

The narrow channel rule recognizes anchorages and navigating channels side by side and does not require leaving the channel and invading the anchorage.

The Bee, 138 F. 303.
The La Bretagne, 179 F. 286.
The Randolph, 200 F. 96.

The narrow channel rule relates to passing of navigating and not anchored vessels.

The John H. Starin, 122 F. 236.
The Belfast, 226 F. 362.

Is the last clear chance doctrine the law of this court sitting in admiralty?

The Yucatan, 236 F. 436.
American Hawaiian Co. v. King Coal Co., 11 F. 2nd 41.
The Miner, 260 F. 901.
The Waterford, 6 F. 2nd 980.
The Kathleen Tracy, 296 F. 711.
The Daniel McAllister, 258 F. 594.

Appeal on conclusions to be drawn from facts is not a shadow but a substantial right.

The Adriane, 13 Wal. 475.
The Columbian, 100 F. 991.

Degree of skill and knowledge required of a pilot.

Atlee v. Packet Co., 21 Wal. 389.
Davidson S. S. Co. v. U. S., 205 U. S. 187.

The basis of negligence is whether reasonable prudence was exercised, not possibilities indicated by the event.

The Nevada, 106 U. S. 154.
Carscallen v. Coeur D'Alene Co. (Ida.), 98 Pac. 622.

Respectfully submitted,

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